

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DISTRICT COUNCIL 16 NORTHERN )  
CALIFORNIA HEALTH AND )  
WELFARE TRUST FUND, AND ITS )  
JOINT BOARD OF TRUSTEES, )  
et al., )  
Plaintiff(s), )  
v. )  
WALLACE FLOORING, INC., )  
Defendant(s). )  
\_\_\_\_\_  
No. C10-5961 CW (BZ)  
  
**REPORT AND RECOMMENDATION  
ON PLAINTIFFS' MOTION FOR  
DEFAULT JUDGMENT**

The Honorable Claudia Wilken has referred to me for a Report and Recommendation plaintiffs' motion for entry of default judgment against defendant. Defendant has never appeared in this action and did not respond to plaintiffs' motion.

On December 29, 2010, plaintiffs filed a complaint under Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a), and Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132. The complaint alleged that defendant violated a

1 collective bargaining agreement and certain trust agreements  
2 with the District Council 16 Northern California Health and  
3 Welfare Trust Fund, Northern California Resilient Floor  
4 Covering Pension Fund, Central Coast Counties Floor Covering  
5 Industry Pension Fund, District Council 16 Northern California  
6 Apprentice and Journeyman Training, and the Joint Board of  
7 Trustees, the trustee of the funds (collectively, "Trust  
8 Funds"). Complaint at ¶ 1. Specifically, the complaint  
9 alleged that defendant was bound by the collective bargaining  
10 agreement and the trust agreements to make contributions to  
11 the Trust Funds on behalf of defendant's employees. Id. at ¶¶  
12 13-17. Defendant has violated these agreements because it is  
13 delinquent in its obligations to the Trust Funds, and  
14 plaintiffs seek damages for unpaid contributions, liquidated  
15 damages, interest, reasonable attorneys' fees, costs, and  
16 other relief "as the Court may deem just and proper." Id. at  
17 Prayer.

18 Plaintiffs effected service of process on December 31,  
19 2010. Defendant failed to answer the complaint or otherwise  
20 defend the action. On February 1, 2011, upon plaintiffs'  
21 request, the Clerk of this Court entered defendant's default  
22 under Rule 55(a). By its default, defendant is deemed to have  
23 admitted the well-pleaded averments of the complaint except  
24 those as to the amount of damages. See Fed. R. Civ. P. 8(d);  
25 TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th  
26 Cir. 1987).

27 A court may not enter a default judgment against an  
28 unrepresented minor, an incompetent person, or a person in

1 military service. See Fed. R. Civ. P. 55(b)(2); 50 App.  
2 U.S.C. § 521. As a corporation, defendant is not afforded  
3 such protection.

4 Pursuant to Rule 55(b)(2), a court may enter a default  
5 judgment against a party against whom default has been  
6 entered. The decision to grant or deny a default judgment  
7 under Rule 55(b) is within the discretion of a Court. Eitel  
8 v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). A formal  
9 hearing is not required for a court to render a default  
10 judgment. Davis v. Fendler, 650 F.2d 1154, 1161 (9th Cir.  
11 1981).

12 Section 1132(g) of ERISA provides that in an action to  
13 enforce payment of delinquent contributions:

14 the court shall award the plan -  
15 (A) the unpaid contributions,  
16 (B) interest on the unpaid contributions,  
17 (C) an amount equal to the greater of -  
18 (I) interest on the unpaid contributions, or  
19 (II) liquidated damages provided for under the  
plan in an amount not in excess of 20 percent.  
20 . . . of the amount determined by the court under  
21 subparagraph (A),  
22 (D) reasonable attorney's fees and costs.

23 29 U.S.C. § 1132(g)(2). A plaintiff is entitled to a  
24 mandatory award under Section 1132(g)(2) if the following  
25 requirements are satisfied: (1) the employer is delinquent at  
the time the action is filed; (2) the district court enters a  
judgment against the employer; and (3) the plan provides for  
such an award. Plumbers & Pipefitters Nat'l Pension Fund v.  
Eldridge, 232 Fed. Appx. 680, 683 (9th Cir. 2007). Here,  
plaintiffs have established that defendant was delinquent and  
that the plan provides for an award under Section 1132(g). I

1 recommend that judgment be entered in plaintiffs' favor;  
2 accordingly, plaintiffs have satisfied the three requirements.

3 Plaintiffs have the burden of proving damages. Bd. of  
4 Tr. of the Boilermaker Vacation Trust v. Skelly Inc., 389  
5 F.Supp.2d 1222, 1226 (N.D. Cal., 2005). To prove damages,  
6 plaintiffs have submitted a declaration from Carolyn Young-  
7 Tem, an employee of the third party administrator that helps  
8 manage the Trust Funds. Young-Tem Declaration at ¶ 1. This  
9 declaration establishes that defendant failed to make  
10 contributions to the Trust Funds in the amount of \$89,097.83.  
11 Id. at Ex. A. In a supplemental declaration after the  
12 hearing, plaintiffs ask that this amount be reduced by  
13 \$22,354.77 since a contribution was recently made in this  
14 amount. Williams Supplemental Declaration at ¶ 7. The amount  
15 of contributions left unpaid is now \$66,743.18. I am  
16 satisfied that this is the correct amount and recommend that  
17 plaintiffs recover \$66,743.18 in damages for unpaid  
18 contributions.

19 Plaintiffs also seek \$24,547.20 in liquidated damages for  
20 unpaid contributions and contributions that were paid late.  
21 ERISA provides that the highest permissible rate of liquidated  
22 damages is twenty percent. See 29 U.S.C. § 1132(g)(2).  
23 Section III of the Trust Agreement provides for liquidated  
24 damages on delinquent contributions at the rate of 20 percent.  
25 Williams Declaration, Ex. C at 3. For delinquent  
26 contributions that were paid before the filing of a lawsuit  
27 (i.e., late contributions rather than unpaid contributions),  
28 the liquidated damages rate is reduced to 10 percent with a

1 cap of \$750.00. Id.

2 I find that the liquidated damages requested by  
3 plaintiffs are appropriate for each month besides June 2010.  
4 For June, plaintiffs ask for liquidated damages of 20 percent  
5 based on the delinquent contributions for that month:  
6 \$15,101.96. Plaintiffs, however, fail to take into account  
7 that defendant paid \$11,138.04 on October 4, 2010 and  
8 therefore the outstanding balance for June's unpaid  
9 contributions is only \$3,963.92. Pursuant to the Trust  
10 Agreement, plaintiffs' liquidated damages for this month are  
11 limited to \$750.00 for the late contribution and 20 percent of  
12 the unpaid contributions (\$3,963.92), which amounts to  
13 \$792.78, for a total of \$1542.78.<sup>1</sup> Using this figure as the  
14 amount of liquidated damages for June 2010, the plaintiffs'  
15 liquidated damages request is reduced to \$23,069.59, which I  
16 recommend should be awarded.

17 Plaintiffs also seek interest of 5 percent on delinquent  
18 and late contributions. Under ERISA, the Trust may recover  
19 interest based on the rate set by the Trust Agreement. See 29  
20 U.S.C. 1132(g)(2). The Trust Agreement states that interest  
21 shall be recovered at the rate provided by the Underpayment  
22 Rate of the Internal Revenue Code Section 6621 which sets the  
23 rate at 5 percent for corporations. See Williams Supplemental  
24 Declaration at ¶ 3-6. Based on this rate, which was adopted  
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26 <sup>1</sup> While plaintiffs claim the Trust Agreement permits  
27 them to recover the greater amount because the delinquent  
28 contributions were not paid during June, the Agreement is at  
best ambiguous on this issue and I do not recommend construing  
it in plaintiffs' favor.

1 by plaintiffs' Board of Trustees, plaintiffs seek \$3,345.84 in  
 2 interest on delinquent contributions. I recommend that  
 3 plaintiffs recover this amount.

4 Plaintiffs also seek \$14,925.00 in attorneys' fees and  
 5 \$655.00 in costs. Reasonable attorneys' fees and costs of the  
 6 action may be awarded to a Trust Fund that receives a judgment  
 7 in its favor.<sup>2</sup> See 29 U.S.C. § 1132(g)(2)(D). Counsel for  
 8 plaintiffs ask to be reimbursed for 63.5 hours of attorney  
 9 time and 23.1 hours of legal assistant time. Plaintiffs also  
 10 incurred \$655.00 in costs consisting of filing fees and costs  
 11 associated with service of process. Williams Declaration at ¶  
 12 33. Having reviewed the declarations submitted in support of  
 13 plaintiffs' application, I find that these amounts are  
 14 reasonable and recommend that plaintiffs recover \$14,925.00 in  
 15 attorneys' fees and \$655.00 in costs.

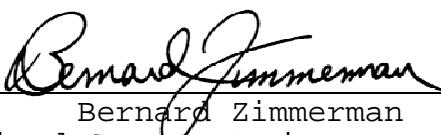
16 Lastly, plaintiffs request that defendant be ordered to  
 17 subject itself to an audit of its payroll records. Section  
 18 III(D) of the Trust Agreement permits plaintiffs to conduct  
 19 such audits; accordingly, I recommend granting plaintiffs'  
 20 request.

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21       <sup>2</sup> To determine the reasonable amount of attorneys'  
 22 fees, courts should "calculate the 'lodestar figure' by taking  
 23 the number of hours reasonably expended on the litigation and  
 24 multiplying it by a reasonable hourly rate." Fischer v. SJB-  
P.D. Inc., 214 F.3d 1115, 1119 (9th Cir. 2000)(citing Hensley  
v. Eckerhart, 461 U.S. 424, 433 (1983)). Courts must review  
 25 detailed time records to determine whether the hours expended  
 26 on a matter were reasonable or excessive, and they must also  
 27 determine the reasonable hourly rate by looking to "the rate  
 28 prevailing in the community for similar work performed by  
 attorneys of comparable skill, experience, and reputation."  
Chalmers v. City of L.A., 796 F.2d 1205, 1210-11 (9th Cir.  
 1986), reh'q denied, amended on other grounds, 808 F.2d 1373  
 (9th Cir. 1987).

1 For the foregoing reasons, I recommend that Judgment be  
2 entered in plaintiffs' favor against defendant for  
3 \$108,738.61. This amount includes \$66,743.18 in unpaid  
4 contributions, \$23,069.59 in liquidated damages, \$3,345.84 in  
5 interest on unpaid contributions, \$14,925.00 in attorneys'  
6 fees, and \$655.00 in costs.

7 Dated: May 31, 2011

8   
9 Bernard Zimmerman  
United States Magistrate Judge

10 G:\BZALL\-\REFS\DISTRICT COUNCIL V. WALLACE FLOORING (R&R)\DEFAULT JUDGMENT  
11 R&R.wpd